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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. NICHOLAS A. HAMPEL, Defendant and Appellant.	B158833 (Los Angeles County Super. Ct. No. LA037467)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michelle Rosenblatt, Judge. Affirmed.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and Stephanie C. Brenan, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

A jury convicted appellant Nicholas A. Hampel of one count of committing a lewd act upon a child under the age of 14 in violation of Penal Code section 288, subdivision (a).[1] The jury found true the allegation that appellant engaged in substantial sexual conduct with the victim within the meaning of section 1203.066, subdivision (a)(8). The trial court sentenced appellant to the low term of three years in state prison.

Appellant contends on appeal that: (1) the trial court erred prejudicially and denied appellant his state and federal constitutional rights to present a defense when it excluded relevant expert testimony and, assuming the trial court correctly denied the expert testimony on the basis of inadequate notice, trial counsel was ineffective; (2) the trial court violated appellant's state and federal constitutional rights to a full and fair trial by an impartial and unanimous jury when it denied appellant's motion for a new trial based on juror misconduct; and (3) appellant's convictions should be reversed because his jury was improperly instructed with CALJIC No. 17.41.1.

FACTS

I. Prosecution Evidence

In October 2000, J. attended a fiesta at St. Genevieve School with his family. J. was 11 years old at the time. On the first day of the fiesta, a Friday, J. saw appellant, whom he knew from the park where he and his siblings played sports. Appellant talked and played with the kids at the park, and worked as a coach and umpire. At the fiesta, appellant asked J. if he "wanted to learn how to have sex or learn about sex." J. thought he answered, "yes." J. did not know much about sex, and did not know exactly what appellant meant. That night, nothing further occurred because the fiesta was closing. J. went home with his family.

J. returned to the fiesta on Sunday with his family and his friend Joey. J. and Joey saw appellant. J. told Joey that he was looking for appellant because appellant was going to teach him how to have sex. J. asked Joey if he "wanted to learn about sex," but Joey

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

said "no." J. and Joey looked for appellant and found him approximately one hour after they arrived. J. and Joey talked with appellant. The three of them played some games. Appellant gave the boys some ride tickets and joined them on a ride. After the ride, appellant asked J. if he "wanted to go learn about sex now." J. did not respond. Appellant asked Joey if he "wanted to learn about sex," and Joey said "no."

Appellant, J., and Joey started walking toward a bathroom located inside a building. Appellant told Joey to stay outside and watch for people. Appellant and J. entered the bathroom, and Joey stood by the door. J. and appellant waited until a man washed his hands, and then J. entered a bathroom stall. Appellant followed J. into the stall and closed the door.

Appellant stood with his back to the door and told J. to put one foot on the "stall" and the other foot behind it so that it would look like appellant was alone. At appellant's direction, J. pulled down his pants and underwear. Appellant started touching J.'s penis. Appellant moved his hands back and forth on J.'s penis for approximately 15 minutes. As appellant did so, he asked J. if his penis was getting harder, but J. did not answer. While appellant and J. were in the stall, Joey shouted into the bathroom and asked, "Are you finished?" Neither appellant nor J. answered him. Because J. was feeling uncomfortable and wanting to leave, he asked appellant if he was finished. Appellant said he was not, but he stopped touching J.'s penis. J. pulled up his pants.

As they were leaving the bathroom, appellant told J. not to tell his parents. J. did not respond. When J. came out of the bathroom, he told Joey to run. J. told Joey what had occurred in the bathroom. Joey told J. that he should tell his mother, but J. was afraid. J. and Joey then rode some of the rides and played at some of the game booths. Joey found J.'s sister, D., who was two years older than J.. Joey told her about the incident that occurred between appellant and J.. J. saw appellant again that evening, but nothing happened. J. went home with his parents and did not see appellant again.

J. spoke with D. about the incident. D. later told their older brother, B., who also talked with J. about the incident. B. eventually wrote a letter to their parents and told

them what had happened. J. then discussed the incident with his parents. He felt ashamed.

A few days after B. told his parents, and the day after J.'s birthday, J.'s parents took him to the police department where they reported the incident. At trial, J. testified that he delayed in reporting the incident because he "felt embarrassed" about it.

Detective Terence Kibodeaux, who interviewed J., investigated the incident. He arranged to meet appellant at appellant's home. Detective Kibodeaux told appellant that a 12-year-old boy had reported that appellant had taken him into a restroom during the fiesta and masturbated him. Appellant responded that it "was true and that is, in fact, what he did." Appellant said he was sorry and could not explain why he did it. He appeared to be upset and remorseful.

II. Defense Evidence

Appellant testified on his own behalf. He was 20 years old at the time of the incident. Appellant was a member of the Parks and Recreations Department staff for the City of Los Angeles. He worked as an umpire and volunteered as a coach. Appellant saw J. in April 2000, but had talked to him only once. Their discussion did not involve sex. He had never made advances to children at the playground. He had never made advances to any of his siblings.

Appellant volunteered to help family members at the food booth they ran at the fiesta. During one of his breaks on Friday night, appellant saw J.. J. approached appellant and asked appellant what he knew about sex. J. said he was seeing a girl. Appellant was shocked by the question. For a period of 15 to 20 minutes, J. kept nagging appellant to teach him about sex, and appellant kept refusing. Appellant told J. to ask his family members. J. said he would see appellant on Sunday.

On Sunday afternoon, appellant was finishing the last of several beers he had drunk that afternoon when he saw J. and his friend Joey. Appellant had never seen Joey before. Appellant gave J. and Joey some tickets he was not using, and accompanied the two boys on one ride. J. again brought up the subject of sex and said Joey wanted to do it. J. asked appellant if he was ready to teach him. Appellant said, "no" and said he did

not want to talk about it. He tried to "isolate" J. from himself. J. and Joey more or less begged appellant to show them.

After getting off one of the rides, J. felt ill and sat down with appellant. After approximately half an hour, J. said, "I'm ready to, you know, go out and hang out now." J. said he would pick the spot. Joey also asked appellant to teach them. Appellant was feeling intoxicated from the beer. He told the boys he did not want to do it at all. Appellant began to walk away. J. became a little upset and said, "Come on, come on. Let's do it. I want to learn." J. grabbed appellant's shoulders while he urged appellant on. Appellant told J. to ask his family, but J. said he did not trust them. He was also too embarrassed to ask them, and he trusted appellant. Appellant responded that he did not do "this kind of nonsense crap." Finally, appellant asked J. what it would take to "lay off my back." J. told appellant that he wanted to learn to masturbate. J. said he would not tell his parents. Appellant then agreed to "do it for five minutes." Appellant found it hard to say "no" to anyone. J. was excited and jumping when appellant agreed.

The two boys and appellant went to a bathroom, but it was locked. J. had the idea to use another one. J. looked inside and saw two men, and he told appellant to wait. J. told Joey to be the lookout so that J. and appellant would not get in trouble. J. told appellant he would be in the back stall, and he entered the bathroom. When the last of the two men left the bathroom, J. yelled to appellant to enter. Appellant was still feeling "a little tipsy," and he did so. Appellant got in the stall with J. and closed the door. J. told him to lock it. Appellant told J. that he did not "really want to do this," but he would do it to make J. get away from him.

J. told appellant how to stand so that only appellant's legs would be visible from the outside, and appellant did as he was told. J. lowered his pants to midthigh and said to appellant in a giggling manner, "Well, how do you do it, straight out?" Appellant answered, "Okay. Whatever hand you want. This is how you masturbate. I guess take your hand and just go up and down with it." Appellant actually used the term "jack off" instead of "masturbate" because that is the term J. used. J. grabbed his penis and moved his hand up and down. Appellant said it was "disgusting looking." After two or three

minutes, J. became upset and said it was not working. Appellant told J. that he might not be ready. J. then said to appellant, "Why don't you try it?" Appellant said he would not and that he was just going to teach him. J. said, "just to do it," that no one would find out, and it would be their secret. After refusing again, appellant finally agreed to do it if it would make J. happy. Appellant grabbed J.'s penis and masturbated him. J.'s penis did not "get[] harder." After about two minutes, appellant decided to give up and told J. it was horrible and it was not working. He told J. that he was too young and "just not ready." He told him he was "still a minor." J. was upset that it did not work, but said "all right." At some point, Joey walked into the bathroom. Appellant asked Joey if someone was entering the bathroom, and Joey said "no." If someone had come in, appellant would have left because he felt he was doing something he did not want to do.

As appellant and J. washed their hands, appellant told J. he had never done anything like that before, that he was "around kids," and that he did not do "this kind of nonsense." Appellant said that he and J. had used "bad judgment." Appellant told J. he would not tell J.'s parents. He said, "I'm just going to walk away like this never happened, because this is something I don't do for a living." J. told appellant not to say a word and that he would not either. Appellant agreed and said, "This is like it never happened." J. agreed.

Appellant believed that he and J. were inside the bathroom for approximately six minutes. When appellant and J. exited, Joey was waiting. Appellant told Joey, "Well, Joey, I don't want to do this. I'm done. It's up to you. I don't really want to do it. It's up to you. So I'm going to head back to work." J. urged Joey to "do it," but Joey said he did not want to. Appellant said to Joey that he made a "[g]ood choice" and told him, "[a]t least you're the one who doesn't want to do this kind of stuff."

As appellant and the two boys walked away, J. and Joey asked appellant for money to play games. Appellant, J., and Joey then played more games at a booth, and appellant gave the two boys the rest of his tickets. J. said to appellant, "[o]h, thanks a lot, but it didn't happen." Appellant replied, "Yeah, it didn't happen, dude, but I don't want to do it again." J. and Joey left appellant, and he returned to work.

Appellant felt bad about the incident. A Detective Kibodeaux contacted him in February 2001. Appellant asked Detective Kibodeaux to tell J.'s family that it was bad judgment on his part, that he never did this to anyone, and that he felt bad. Appellant asked to make a statement but Detective Kibodeaux told him it was not necessary, and appellant was not able to give his version of the incident.

When asked at trial if J. had orchestrated the incident, appellant said that he had. Appellant said that, "he is the kind of kid that wanted to do it." Appellant said he folded under pressure from J.. Appellant was just assisting J. in getting an erection. Also, the beers he drank at the Fiesta had affected his judgment. Appellant admitted knowing at the time of the bathroom incident that he had exercised bad judgment, and "this [was] not me."

Appellant testified that he had attended church every week throughout his life. He presented several character witnesses, including his father, his supervisor, and a fellow park volunteer. Appellant's father testified that appellant had always been very honest and truthful and had never exhibited deviant behavior. Appellant's supervisor testified that appellant had been truthful and honest with him. He observed appellant interacting well with the children. Children and parents liked appellant, and he never received any complaints of appellant making sexual advances towards children. He had never observed appellant display any sexual abnormality with children. Appellant's fellow coach described appellant as a hard worker, and a diligent, reliable, and truthful person. He had never observed appellant display any abnormal behavior with children.

III. Rebuttal Evidence

B. attended the fiesta on Sunday. B. spoke with appellant for about 10 minutes and did not observe any signs of intoxication in appellant.

IV. Surrebuttal

After the fiesta, sometime in mid-December, J. told B. about the incident. J. did not want their parents to know until after Christmas so as not to ruin the holiday. B. promised J. that he would not tell their parents until after Christmas. On January 27, 2001, B. finally wrote a letter to his parents about the incident and gave it to them. Prior

to receiving B.'s letter, J.'s parents had not been aware of the incident. B. asked his parents not to report the incident to the police until after J.'s birthday. On the day after J.'s birthday, his parents went to the police.

DISCUSSION

I. Exclusion of Expert Testimony

A. Appellant's Argument

Appellant contends the trial court erroneously excluded the testimony of Dr. Joseph Bon Giovanni and Dr. Raymond Anderson, whose expert opinions were central to his defense and claim of innocence. Appellant complains that he was obliged to defend against the prosecution case without presenting his evidence that experts familiar with the charges had opined that J.'s story lacked credibility. According to appellant, J.'s lack of credibility was shown by the delay in reporting the incident and the disorganized nature of the investigation. Appellant was also denied the opportunity to present evidence that he was not a pedophile, and that he did not masturbate the victim for the purpose of sexual arousal.

Appellant claims that there were far less drastic measures the trial court could have taken instead of excluding the testimony. Appellant suggests that a jury instruction such as CALJIC No. 2.28[2] would have rightfully penalized the defense without

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[2] CALJIC No. 2.28 provides: "The prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at trial so as to promote the ascertainment of the truth, save court time and avoid any surprise which may arise during the course of the trial. [Concealment of evidence] [and] [or] [[D] [d]elay in the disclosure of evidence] may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the non-complying party's evidence. [¶] Disclosures of evidence are required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of trial must be disclosed immediately. In this case, the [People] [Defendant[s]] _____ [concealed] [and] [or] [failed to timely disclose] the following evidence: _____ [¶] Although the [People's] [Defendant's] _____ [concealment] [and] [or] [failure to timely disclose evidence] was without lawful justification, the Court has, under the law, permitted the production of this evidence during the trial. [¶] The weight and significance of any [concealment] [and] [or] [delayed disclosure] are matters for your

compromising his right to present a defense. The trial court also abused its discretion in finding the opinions not relevant.

Appellant adds that, assuming the trial court properly excluded the expert testimony based on lack of adequate notice, counsel was ineffective.

B. Proceedings Below

The record shows that at a pretrial hearing on October 16, 2001, counsel gave the prosecution copies of Dr. Bon Giovanni's résumé and a report by Dr. Anderson. Counsel informed the prosecutor that Dr. Bon Giovanni would testify regarding Dr. Anderson's report. The prosecutor objected to Dr. Bon Giovanni being called because the lateness of the information constituted a discovery violation. Also, Dr. Bon Giovanni was appellant's relative, and Dr. Bon Giovanni did not have any relationship to Dr. Anderson that would qualify him to testify regarding Dr. Anderson's report. The prosecutor also argued that Dr. Anderson's findings were not relevant, even if he himself were to testify. In his report summary, Dr. Anderson stated that appellant's social interactive skills and style were not consistent with a habitual child sexual abuser, and the prosecution pointed out that it was not contending that appellant was a habitual child sexual abuser.

When asked for an offer of proof regarding Dr. Bon Giovanni, counsel stated that Dr. Bon Giovanni was an expert in dependency cases and would testify that the procedures used in marshaling the evidence in this case were not up to professional standards. He stated he would make Dr. Bon Giovanni available for the prosecution. He added that Dr. Bon Giovanni, as appellant's uncle, could testify as a character witness for appellant.

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consideration. However, you should consider whether the [concealed] [and] [or] [untimely disclosed evidence] pertains to a fact of importance, something trivial or subject matter already established by other credible evidence. [¶] [A defendant's failure to timely disclose the evidence [he] [she] intends to produce at trial may not be considered against any other defendant[s] [unless you find that the other defendant[s] authorized the failure to timely disclose].]"

Counsel then stated that Dr. Bon Giovanni would not testify regarding Dr. Anderson's report after all, and he would call Dr. Anderson as a witness instead. When asked for an offer of proof regarding Dr. Anderson, counsel stated that Dr. Anderson would testify that the tests appellant had taken indicated that he did not have the characteristics of a pedophile and that he was no risk to society. Dr. Anderson would also testify about masturbation without arousal and give his opinion that appellant was not aroused when he committed the offense.

With respect to Dr. Bon Giovanni, the trial court ruled that there was clearly a discovery violation. In addition, the disorganized manner in which the evidence was marshaled did not appear to be a proper subject of expert testimony in a criminal case. The failure to adhere to the standards of gathering evidence in dependency cases was likewise not relevant in the instant criminal case. Because there had been no good reason for the delayed discovery and because the information he was to testify about was not relevant, Dr. Bon Giovanni's testimony would be limited to character evidence based on his relationship to appellant.

With respect to Dr. Anderson, the trial court pointed out that the doctor had prepared his report in June (four months earlier), and Dr. Anderson had not been mentioned as a possible witness at any of numerous prior proceedings. The People would not have time to adequately prepare for cross-examining the doctor. Also, whether or not appellant was a risk to society was not relevant.

The trial court stated, however, that there "may be some relevance" to whether appellant had the characteristics of a pedophile. The trial court asked the prosecution what type of sanction it would seek with respect to that aspect of Dr. Anderson's testimony. The prosecutor stated that a jury instruction based on late discovery would not be curative because she would not have time to prepare for Dr. Anderson's testimony and possibly seek her own experts. A continuance would be the next option, but it would be very difficult for the victim and his family.

In making its ruling the trial court noted that the prosecution would have only one court day between its first opportunity to interview Dr. Anderson and the doctor's

testimony. The trial court also expressed concern for the victim and his family stating, "It's very difficult, as you know, on any witness to have a case like this hanging over their head, and for me to continue the case again, so that you can get a fairly generalized expert opinion on whether or not the defendant is -- has the characteristics of a pedophile, and even though it may have some relevance, I balance that against the harm to or potential harm to the child in continuing the case again, and the -- I guess lack of fairness is maybe the best word -- to the People in not having an adequate opportunity to prepare for the doctor if I don't continue the case. [¶] When I balance all of that out -- I'm sorry -- . . . what falls is the testimony of Dr. Anderson. It's just not fair. [¶] I can't do it. I'm going to, for all of the reasons I've stated, I'm going to deny the testimony of Dr. Anderson."

Appellant substituted in new counsel after his conviction. He then moved for a new trial based in part on ineffective assistance of counsel stemming from his trial counsel's failure to file a timely witness list, which resulted in the exclusion of Dr. Anderson's testimony. The trial court reiterated that no other remedy had been acceptable. The trial court agreed that "a reasonably competent attorney would have followed the discovery rules," but found that the exclusion of the testimony did not result in the withdrawal of a potentially meritorious defense. The trial court pointed out that appellant was not prejudiced because other defense witnesses testified about appellant's "lack of character for sexual deviant behavior," which was not refuted by the prosecution. Also, the trial court found that the portion of Dr. Anderson's opinion stating that pedophiles believe that sexual experiences are beneficial learning experiences for children was potentially harmful to appellant. This language went against the defense theory that appellant was not aroused by the behavior but had merely gone along with J.'s insistent requests for instruction about sex. The trial court denied the new trial motion.

C. Relevant Authority

We review the trial court's ruling on the exclusion of expert testimony for abuse of discretion. (*People v. McDonald* (1984) 37 Cal.3d 351, 373, disapproved on another point in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.) A trial court's discretion in

determining the proper sanction for an abuse of discovery is very broad. (*People v. Jenkins* (2000) 22 Cal.4th 900, 951.) "Where, as here, a discretionary power is inherently or by express statute vested in the trial judge, his or her exercise of that wide discretion must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Jordan* (1986) 42 Cal.3d 308, 316.) Prejudice occurs from the erroneous exclusion of expert testimony only if it is reasonably probable that a defendant would have obtained a more favorable result had the error not occurred. (*People v. Sanders* (1995) 11 Cal.4th 475, 510.) If exclusion of evidence affects a defendant's substantial constitutional rights, such as precluding a defense, the error must be harmless beyond a reasonable doubt. (*People v. Edwards* (1993) 17 Cal.App.4th 1248, 1266.)

Section 1054.5, subdivision (c) makes clear that precluding a defendant from presenting evidence is a measure of last resort and is appropriate where there has been significant prejudice and the failure is willful. (*People v. Edwards*, *supra*, 17 Cal.App.4th at p. 1265.) The trial court "must consider the extent to which exclusion of particular evidence may undermine the reliability of the fact finder's conclusion. Further, the court should consider whether the failure to comply was 'willful and motivated by a desire to obtain a tactical advantage.'" (*People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1757.)

The appropriateness of exclusion as a sanction for discovery violations depends on whether the trial court wishes to address prejudice to the surprised party, or to punish the offending party, or both. (*People v. Gonzales*, *supra*, 22 Cal.App.4th at p. 1757.) Punishment is normally meted out when the offending party's conduct is willful. (*Ibid*.) Exclusion is more likely to be appropriate when the court is seeking only to address prejudice. (*Ibid*.) The prejudice would have to be "substantial and irremediable," however, and the effect of exclusion on the truth-finding process would have to be carefully balanced. (*Id*. at pp. 1757-1758.)

In *Taylor v. Illinois* (1988) 484 U.S. 400 (*Taylor*), the Supreme Court indicated that in determining whether to preclude testimony, "[i]t is elementary, of course, that a trial court may not ignore the fundamental character of the defendant's right to offer testimony of witnesses in his favor. But the mere invocation of that right cannot automatically and invariably outweigh countervailing public interests. The integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance." (*Id.* at pp. 414-415, fn. omitted.) The court in *Taylor* rejected the notion that a preclusion sanction is never appropriate regardless of the seriousness of a defendant's discovery violation. (*Id*. at p. 416.)

D. Evidence Properly Excluded

We conclude that Dr. Bon Giovanni's testimony was not relevant, and therefore the trial court did not abuse its discretion in excluding it. According to the defense, Dr. Bon Giovanni was a psychologist who had expertise in child dependency matters. He would testify that the procedures used in investigating appellant's case were disorganized and not up to professional standards as he knew them in the dependency field. This expert opinion evidence had no "tendency in reason to prove or disprove any disputed fact" in appellant's case.[3] (Evid. Code, § 210.) Appellant admitted that he masturbated J.; the only disputed issue in the case was his intent when doing so. The same is true for the other items Dr. Bon Giovanni may have testified about, such as J.'s mother's delay in reporting. In any event, the evidence showed that there was only a delay of a few days -- until J.'s birthday had passed.

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[3] According to CALJIC No. 10.41, read to the jury, the elements of a violation of section 288, subdivision (a) are: "1. A person touched the body of a child; [¶] 2. The child was under 14 years of age; and [¶] 3. The touching was done with the specific intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person or the child."

With respect to Dr. Anderson's testimony, the trial court found possible relevance in that portion of his report that said appellant did not have the characteristics of a pedophile. The trial court properly balanced the factors at issue when excluding the evidence and did not do so in an arbitrary or capricious manner. The record shows that the trial court gave thorough consideration to the best course to take, balancing the tenuous relevance of the proffered testimony against the unexcused delay -- a delay that resulted in great prejudice to the prosecution and harm to the victim and his family. Given these factors and the unsuitability of any of the alternative sanctions for the delay in discovery, the trial court did not abuse its discretion in excluding Dr. Anderson's testimony regarding his opinion that appellant did not have the characteristics of a pedophile. The trial court acted in accordance with *Taylor* by balancing appellant's right to offer the testimony of witnesses in his favor with the "countervailing public interests." (*Taylor*, *supra*, 484 U.S. at p. 414.)

Appellant cites *People v. Stoll* (1989) 49 Cal.3d 1136 (*Stoll*) and *People v. Jones* (1990) 51 Cal.3d 294, for the proposition that a defendant may introduce expert character evidence, based on personal interviews and standardized tests, that indicate his personality profile does not include a capacity for deviant behavior with children. (*People v. Jones*, *supra*, at p. 320; *Stoll*, *supra*, at p. 1161.) In *Stoll*, a child molestation case, the appellate court determined that a psychologist's evidence that the test and interview results of two of the defendants showed it was unlikely that they were involved in the charged events was improperly excluded. (*Stoll*, *supra*, at pp. 1152-1153.) Citing *People v. Jones* (1954) 42 Cal.2d 219, 222, *Stoll* found that the proffered testimony was relevant character evidence. (*Stoll*, at p. 1152.) However, in both *Stoll* and the case on which it relied, *People v. Jones*, *supra*, 42 Cal.2d 219, the defendants denied that the charged acts of child molestation occurred. (*Stoll*, at pp. 1140, 1152; *People v. Jones*, *supra*, 42 Cal.2d at pp. 222, 223.) The opinion evidence regarding the defendants' sexual tendencies in those cases was therefore relevant on the issue of whether or not they committed the charged acts. (*Stoll*, at p. 1152; *People v. Jones*, *supra*, 42 Cal.2d at p. 225.) Indeed, in *People v. Jones*, the court found that the required specific intent must

have been present if the defendant's conduct was as described by the child victim.[4] (*People v. Jones, supra,* 42 Cal.2d at p. 223.) In the instant case, appellant did not claim he was innocent of the lewd act, and the evidence that he lacked the characteristics of a pedophile was of marginal relevance.

The trial court also correctly ruled that whether appellant was a risk to society was not a proper issue for the jury, but rather had relevance only for sentencing. Likewise, with respect to Dr. Anderson's proposed testimony about "masturbation without arousal" and his opinion that appellant's masturbation of the victim was not done for purposes of sexual arousal, we agree with the trial court that this opinion evidence was not proper evidence on the issue of whether appellant had the requisite intent required by the statute. The prosecution had the burden of showing by circumstantial evidence that appellant possessed the requisite intent, and it follows that appellant was entitled to refute that evidence by other circumstantial evidence or his own testimony. (See, e.g., *People v. Martinez* (1995) 11 Cal.4th 434, 445.)

E. Ineffective Assistance of Counsel Not Shown

Appellant contends there can be no legitimate tactical reason for counsel's failure to give the People timely notice of the defense intent to call expert witnesses on appellant's behalf. He claims the trial court's ruling excluding evidence central to appellant's claim of innocence violated his due process and Sixth Amendment rights to present a complete defense and to have a fair trial.

A criminal defendant has a state and federal constitutional right to the effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *People v. Pope* (1979) 23 Cal.3d 412, 422.) With respect to counsel's alleged failure, appellant has the burden of establishing by a preponderance of the evidence that trial counsel's performance fell below prevailing professional standards of reasonableness. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.) Appellant must also show that there is a

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[4] The child victim accused the defendant, her uncle, of acts that "amounted to sexual relations without penetration." (*People v. Jones*, *supra*, 42 Cal.2d at p. 221.)

reasonable probability that, but for counsel's unprofessional errors, the outcome of the case would have been different. (*Id.* at pp. 217-218.) A reasonable probability is one "'sufficient to undermine confidence in the outcome.'" (*Id.* at p. 218, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 694.) A reviewing court need not assess the two factors of the inquiry in order, nor must it necessarily address both components of the inquiry. (*Id*. at p. 697.) Thus, if the record reveals that appellant suffered no prejudice, we may decide the issue of ineffective assistance of counsel on that basis alone. (*Ibid*.)

The record shows that only one portion of the proffered evidence was excluded due to a discovery violation. That was the portion of Dr. Anderson's testimony that appellant did not possess the characteristics of a pedophile. The exclusion of this testimony did not deny appellant his right to present a defense. Contrary to appellant's assertion, whether or not appellant possessed the characteristics of a pedophile had only marginal relevance to the issue of whether or not he possessed the required intent of "arousing, appealing to, or gratifying the lust, passions, or sexual desires of [himself] or the child" in the act he committed. (§ 288, subd. (a).) Intent may have been the "heart of the matter" in this case, but appellant's general characteristics did little to disprove he had the intent on this occasion.

Moreover, the record reveals that Dr. Anderson's report contained the statement "that in some instances child sexual abusers may hold views that children are capable of making their own decision in sexual matters or that their sexual experiences with adults are beneficial learning experiences for the child or may hold other clearly self-serving attitudes or beliefs. [¶] My clinical impression of his attitudes in this regard was also that he suffers none of these pathological distortions, . . ." As the trial court pointed out, appellant attempted to portray his role in the incident as "instructional." He argued that he wanted to give "some teaching, some instruction to [J.], . . ." He also portrayed J. as having made all the decisions -- from instigating the conduct to deciding where it would take place and how to avoid being discovered. Thus, had Dr. Anderson testified, the prosecutor could have used Dr. Anderson's report to damage the defense. The trial court

correctly pointed out that appellant's good character traits and lack of deviant character traits were brought out by several character witnesses on his behalf.

Finally, the evidence against appellant was undeniably strong on the issue of intent. Appellant admitted touching J.'s penis and said that he did so to help J. obtain an erection. This constitutes an admission that he touched J. to arouse or appeal to the sexual desires of J. at a minimum. Given this evidence, there is no reasonable probability that appellant would have achieved a more favorable result if Dr. Anderson had been permitted to testify. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Furthermore, the exclusion did not prejudice appellant under any standard. It is beyond a reasonable doubt that the exclusion did not deprive appellant of a meritorious defense. (See *People v. Edwards*, *supra*, 17 Cal.App.4th at p. 1266.)

II. Juror Misconduct

A. Appellant's Argument

Appellant claims that there was serious jury misconduct in his case, and the trial court erred in finding the misconduct nonprejudicial. Appellant asserts that when a person refuses to deliberate and violates his oath as a juror, doubt is cast on that person's ability to otherwise perform his duties, and the presumption of prejudice is appropriate in those situations. In his case, he argues, reversal is required because the jury misconduct was prejudicial and violated his state and federal constitutional rights to a full and fair trial by an impartial and unanimous jury.

B. Proceedings Below

The record shows that the attorneys were given an opportunity to speak with the jurors after the verdict had been read and the jury polled. When the parties reconvened to set a date for sentencing, defense counsel informed the trial court that a female juror appeared to have been "overly influenced by a very aggressive woman, number 10, possibly." He stated that "one of the jurors did not wish to deliberate from the beginning, that she couldn't get her way to have a consensus or a vote, she wanted a consensus or a vote immediately at 9 o'clock when they went back." Counsel went on to say that "she read a book, and she was -- she refused to discuss with the rest of the jurors. She

overpowered number 7, who indicated to me that but for this aggressive woman and her aggressive behavior, she would have voted the other way."

The prosecutor stated that she had received a very different impression. She understood that several people on the jury had told the aggressive woman that she would have to calm down, and at that point she did get angry and open a book. The foreman told her that she was not going to be able to read a book because the jury would have to tell the trial court about anyone who did not deliberate. At that point the aggressive juror put the book down. The prosecutor had asked Juror No. 7 if she believed appellant was guilty, and Juror No. 7 answered, "Yes." The prosecutor had asked Juror No. 7 if she believed appellant had masturbated the victim, and Juror No. 7 said, "Yes."

The trial court instructed defense counsel to file a motion for release of juror information under Code of Civil Procedure section 237 as a first step.[5] After the motion was filed, the trial court heard argument as to whether counsel had made a prima facie case for disclosure of juror information, and determined that a prima facie case had been made with respect to Juror Nos. 7 and 10. The trial court ruled that the jurors' names and addresses would not be revealed in open court, but rather a hearing would be held in which the jurors would testify and after which the court would decide whether to release the juror information. When it was discovered that Juror No. 10 was a male, defense counsel agreed that he not be called. The trial court decided to subpoena Juror No. 7 and

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5 Code of Civil Procedure section 237, subdivision (b) provides in pertinent part: "Any person may petition the court for access to these records. The petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information. The court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the *personal juror* identifying information, but shall not set the matter for hearing if there is a showing on the record of facts that establish a compelling interest against disclosure. A compelling interest includes, but is not limited to, protecting jurors from threats or danger of physical harm. If the court does not set the matter for hearing, the court shall by minute order set forth the reasons and make express findings either of a lack of a prima facie showing of good cause or the presence of a compelling interest against disclosure."

the jury foreman, Juror No. 1, for a *Hedgecock* hearing.[6] Both counsel submitted questions to ask the jurors, and a set of questions was agreed upon.

The foreperson, Juror No. 1, was examined first. He stated, in response to questioning, that no juror refused to contribute his or her opinion during deliberations, no juror refused to remain in the jury room during deliberations, no juror refused to give a reason for his or her opinion, no juror demanded or requested a consensus vote on the issue of guilt prior to selecting a foreperson, and no juror demanded or requested a consensus vote before deliberations. Juror No. 1 was not aware of any jurors who refused to participate in the deliberation process. The foreperson said he encouraged and facilitated jury deliberation and that there was deliberation before the first vote was taken.

When Juror No. 7 was asked if any juror refused to contribute his or her opinion during deliberations, she answered, "Yes." She said that this juror was a woman. Juror No. 7 was not sure of the seat number of the juror in question. She said that no juror refused to remain in the jury room before deliberations, and no juror refused to give reasons for his or her opinion. She said the foreperson did not really encourage jury deliberation, and she herself had to speak up for him. Juror No. 7 said that the foreman and a few other jurors requested a consensus vote prior to deliberations. Juror No. 7 and a few others said, "[W]ait a minute. We need to discuss this before making a judgment . . . ," and no such vote was taken. Afterwards, the jurors all "[b]asically" deliberated.

Juror No. 7 stated that one juror, after she did not get her way, began writing something and reading a book. A few jurors told her that they had to deliberate and this juror said "I guess I'm not needed here. I'm not wanted here," and she took a piece of paper with the apparent intention of asking to be excused. The rest of the jurors proceeded and this juror was "just . . . reading a book." A juror spoke up and said that the jury "needed to take into consideration the two parties involved, and that we needed to -- everybody needed to deliberate, participate actually." When asked if the woman

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6 *People v. Hedgecock* (1990) 51 Cal.3d 395 (*Hedgecock*).

then participated, Juror No. 7 answered, "Not really." The woman did not continue reading, but "basically she was very hostile." "She kept quiet and nodding her head . . . ." Juror No. 7 did not recall the hostile woman saying anything else. She did not read or write anymore, but she acted like she was not interested. The book incident happened toward the middle of deliberations.

Juror No. 7 testified later, however, that the aggressive juror, "anytime anybody wanted to talk, to tell their opinion, she will speak up, and at times very rude. Basically this female, the psychologist, told her -- turned around and told her obviously you have your mind set up before we came in into this room, you're not letting her, meaning me, and myself, just deliberate or talk about the case. Any time we talk about it, you just jump at us."

After ascertaining from both counsel that they required no additional information from the two jurors and that they did not wish to reexamine Juror No. 1, the trial court released the jurors. Defense counsel stated he would be making a motion for a new trial, and a hearing on the motion and sentencing was set for March 8, 2002.

On the day set for the hearing, new defense counsel was substituted in, and a continuance was granted. At the motion hearing, appellant argued that there was a strong enough showing that one juror really did not participate in the deliberations. There was an issue as to whether this juror wanted to vote before deliberation, which indicated she had already made up her mind. Counsel also analogized to the situation where a juror is replaced. In that situation, he argued, the jurors must begin deliberations all over again. Here, one juror was reading for a time, and there is no indication the jurors began deliberations all over again when she put her book down. Therefore, appellant effectively had only 11 jurors. Counsel conceded that the juror apparently did participate after she put down the book.

After hearing argument, the trial court explained that it had used the required three-step inquiry; i.e., determining whether the evidence presented to the trial court was admissible, whether the facts established misconduct, and whether or not any misconduct found was prejudicial. (See *People v. Hord* (1993) 15 Cal.App.4th 711, 724.) The trial

court recounted the testimony from the *Hedgecock* hearing and stated: "Taking Juror No. 7 at face value, the misconduct that I find to have occurred was by the juror who stopped deliberating in the middle of deliberations. However, I find that the misconduct was not prejudicial upon the examination of the entire record, and that there is no substantial likelihood that any juror was improperly influence [*sic*] to the defendant's detriment." The trial court went on to say that "[t]he fact of the matter is, that in most cases, where the court is made aware of misconduct and admonishes the jurors, the offending juror of the duty to deliberate, deliberations resume with all the jurors, and in most cases, the misconduct has been secured [*sic*] obviously there is some cases where the jury apprises the court that the -- that still there are no deliberations and then the court has to take action. [¶] Here no one, including Juror No. 7, complained to the court and that's how we found ourselves obviously in this situation, no one complained of the offending juror, but by Juror No. 7's own words, it's clear that after another juror, admonished the jurors that they must all deliberate all the jurors did deliberate, culminating with a verdict, and because I find that the deliberations resumed and that the offending juror participated in the deliberations, I find that there was no prejudice and the motion for new trial on this ground is denied."

C. Relevant Authority

In *People v. Hedgecock*, *supra*, 51 Cal.3d at page 415 our Supreme Court held "that, when a criminal defendant moves for a new trial based on allegations of jury misconduct, the trial court has discretion to conduct an evidentiary hearing to determine the truth of the allegations."

The granting of a motion for new trial lies in the discretion of the trial court, and its rule will not be disturbed on appeal absent an abuse of discretion. (*People v. Williams* (1988) 45 Cal.3d 1268, 1318.) "'This discretion is, of course, not arbitrary, but like any other judicial function, is to be exercised under the sanction of the judicial oath; and the strong presumption being always that it was so exercised, it will require in any case a very clear showing to the contrary to overcome such presumption and enable us to say

that the power of the court in that respect was abused.' [Citation.]" (*People v. Taylor* (1993) 19 Cal.App.4th 836, 843-844.)

Section 1181 provides: "When a verdict has been rendered . . . against the defendant, the court may, upon his application, grant a new trial, in the following cases only: [¶] . . . [¶] 3. When the jury has . . . been guilty of any misconduct by which a fair and due consideration of the case has been prevented; [¶] 4. When the verdict has been decided . . . by any means other than a fair expression of opinion on the part of all the jurors; . . . " (§ 1181, subds. 3-4.)

Since it is the trial court's function in the first instance to assess witness credibility and resolve conflicts in the evidence, the appellate court must give great deference to the trial court's factual determinations (*Andrews v. County of Orange* (1982) 130 Cal.App.3d 944, 954-955, disapproved on other grounds in *People v. Nesler* (1997) 16 Cal.4th 561, 582, fn. 5) when deciding whether there has been an abuse of discretion. We accept the trial court's determinations as to credibility and findings of historical fact if supported by substantial evidence. (*Nesler*, *supra*, at p. 582.) The issue of whether a defendant was prejudiced by jury misconduct is a mixed question of law and fact subject to independent review. (*Ibid*.)

"Juror misconduct raises a rebuttable presumption of prejudice. The presumption may be rebutted by proof that prejudice did not actually result." (*People v. Mendoza* (2000) 24 Cal.4th 130, 195.) Prejudice "may also be rebutted '". . . by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party. . . ."' (*People v. Miranda* [(1987)] 44 Cal.3d 57, 117[, disapproved on another point in *People v. Marshall* (1990) 50 Cal.3d 907, 933].)" "'Some of the factors to be considered when determining whether the presumption is rebutted are the strength of the evidence that misconduct occurred, the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued.'" (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 256.)

D. New Trial Motion Properly Denied

We conclude the trial court did not abuse its discretion by not granting the new trial motion. The record shows that appellant was not denied a fair trial by an impartial jury, and that he suffered no prejudice from the conduct of the "hostile" unidentified female juror.

One element of the right to trial by jury is that all jurors deliberate together before reaching a verdict. (*People v. Collins* (1976) 17 Cal.3d 687, 693, disapproved on another point in *People v. Boyette* (2002) 29 Cal.4th 381, 462.) This does not mean that jurors are precluded from taking a vote before discussing the case. "[A] party's right to have his case decided by a jury does not necessarily include the right to compel jurors to discuss issues that they have chosen to decide without discussion." (*People v. Bowers* (2001) 87 Cal.App.4th 722, 734.) The taking of a straw vote is "a type of 'deliberations,'" since each juror, after having independently considered the evidence and arguments, sets forth his or her opinion, albeit without disclosing reasons or explaining the decision. (*Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 912.) Here, several jurors, not only the unidentified female juror, wished to take a preliminary vote. In this case, such a vote was not taken. The fact that several jurors wished to undergo this ballot does not signify that their minds were made up or that deliberations were futile.

The record shows that the unidentified female juror did not abstain from deliberations. In addressing the issue of discharging a juror based on an alleged failure to deliberate, the California Supreme Court stated that "[a] refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury. The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to

deliberate and is not a ground for discharge. Similarly, the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge. A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views." (*People v. Cleveland* (2001) 25 Cal.4th 466, 485.) In the instant case, the unidentified female juror may not have deliberated well, and may have temporarily retreated from the discussion in a show of pique, but the testimony of Juror No. 7 clearly indicated that the unidentified female juror participated further in the discussion.

Furthermore, rude outbursts are not necessarily misconduct, and it is not unusual during deliberations for one juror to express "'frustration, temper, and strong conviction against the contrary views of another panelist.'" (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 476.) "Jurors have a duty to discuss the case with fellow jurors. The exchange of views may well become vigorous. Comments may be acerbic, critical, even agitated. A juror may express an adverse comment in reaction to an exhibit, a witness' testimony or demeanor, personality, or credibility. These remarks may be candid, even unflattering. But cutting and sarcastic words do not ipso facto constitute jury misconduct." (*Tillery v. Richland* (1984) 158 Cal.App.3d 957, 977.) In this case, the unidentified female juror did not refuse to deliberate, according to Juror No. 7. Although Juror No. 7 made that accusation, she herself admitted that the unidentified female juror made hostile remarks and nodded her head after she had put down her book.

We conclude there was no refusal to deliberate by the unidentified female juror. Her picking up a book was clearly to demonstrate her irritation to the other jurors, who informed her that this behavior would not be tolerated. When she was told that this behavior would be considered misconduct, she put the book down.

We also conclude that appellant was not prejudiced by the unidentified juror's behavior, whether or not it arose to the level of misconduct. Jurors are expected to

disagree during deliberations, and an attempt to persuade fellow jurors who disagree by strenuous means is not a refusal to deliberate. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1255.) Here, the unidentified female juror was in the deliberation room from the beginning and, except for her transient show of temper, the jurors all deliberated together.

Furthermore, there is no indication in the record that the unidentified juror was biased. As stated in the civil context in *Tillery v. Richland*, *supra*, 158 Cal.App.3d at page 977, "implicit in every adverse jury verdict is bias in a sense, against the position of the losing party, but such bias is based on the evidence and the instructions. Unless it can be demonstrated to have existed at voir dire, and at that time concealed, there is no impropriety." Since there is no indication that appellant's jury was other than fair and impartial, appellant's federal constitutional rights were not violated. The trial court acted properly in determining that appellant was not prejudiced by the alleged misconduct. Its determination will not be overturned on appeal.

III. Reading of CALJIC No. 17.41.1

Appellant contends that CALJIC No. 17.41.1 "generally chills jury deliberations and thereby denies a defendant the right to a jury trial as guaranteed by the Sixth Amendment." According to appellant, the instruction also deprives jurors of their First Amendment right to speak freely during deliberations. Appellant also argues that *People v. Engelman* (2002) 28 Cal.4th 436 (*Engelman*) did not address the jury's power to nullify.

We first observe that appellant makes only general allegations as to the manner in which the claimed defects in CALJIC No. 17.41.1 affect a defendant's trial. Appellant alleges no specific prejudice to himself. The burden is on appellant to show not only error but prejudice resulting from the error. (*People v. Watson*, *supra*, 46 Cal.2d at pp. 834-836.)

In *Engelman*, *supra*, 28 Cal.4th 436, the California Supreme Court held that CALJIC No. 17.41.1 did not infringe upon the defendant's federal or state constitutional right to trial by jury, the state constitutional right to a unanimous verdict, or the right to due process of law. (*Engelman*, at pp. 439-440, 442.) In *Engelman*, as in the instant

case, the jury did not indicate prior to rendering a verdict that there were problems during deliberations. (*Id*. at p. 441.)

In *Engelman*, the California Supreme Court was not persuaded that CALJIC No. 17.41.1 constituted a violation of a defendant's federal or state constitutional rights or other error under state law simply because it might cause a juror to unnecessarily reveal the content of deliberations in the belief that misconduct had occurred. (*Engelman*, *supra*, 28 Cal.4th at p. 444.) The court also pointed out that other instructions fully informed the jury of the duty to reach a unanimous verdict. (*Ibid.*)

The *Engelman* court was concerned, however, that CALJIC No. 17.41.1 had the *potential* to create an unnecessary risk of intrusion on the deliberative process. (*Engelman*, *supra*, 28 Cal.4th at pp. 446-447.) Therefore, it used its supervisory power to direct that the instruction not be given in future trials. (*Id*. at p. 449.) Because there was no evidence that the instruction had affected the jury deliberations in Engelman's trial, the Supreme Court upheld the Court of Appeal's decision affirming the judgment of conviction. (*Id*. at pp. 439-440, 442-445.)

Likewise, we are not persuaded by appellant's general constitutional arguments. In the instant case, there was no evidence of jury deadlock, and we have determined that the one instance of alleged misconduct did not prejudice appellant in any way. There was no indication the use of CALJIC No. 17.41.1 affected the verdict. Indeed, the instruction in this case appeared to have enhanced the jurors' awareness that none of the jury members could opt out of participating in deliberations.

We conclude that appellant's arguments based on the giving of CALJIC No. 17.41.1 are without merit. Accordingly, any error in giving the instruction must be seen as harmless beyond a reasonable doubt. (*People v. Molina* (2000) 82 Cal.App.4th 1329, 1335-1336.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P.J.
BOREN

_____, J.
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